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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0525-16T1

CLAUDIO TUNDO,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT
OF LABOR and BOROUGH OF
RINGWOOD,

Respondents.

Submitted January 10, 2018 – Decided January 30, 2018

Before Judges Fuentes and Suter.

On appeal from the Board of Review, Department
of Labor, Docket No. 087,369.

Mark B. Frost & Associates, attorneys for
appellant (Ryan M. Lockman, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent Board of Review
(Melissa Dutton Schaffer, Assistant Attorney
General, of counsel; Daniel Pierre, Deputy
Attorney General, on the brief).

Kaufman Semeraro & Leibman, LLP, attorneys for
respondent Borough of Ringwood (Justin D.
Santagata, on the brief).

PER CURIAM

Claudio Tundo appeals from a final decision of the Department of Labor and Workforce Development's Board of Review (Board) that disqualified him from unemployment benefits under N.J.S.A. 43:21-5(b) for severe misconduct. We affirm the Board's decision.

I

We derive the factual background from the hearing before the Appeals Examiner.

Tundo was employed by the Borough of Ringwood as a laborer from June 4, 2012 to February 26, 2016, when he was involuntarily terminated from employment. As a laborer, one of Tundo's duties was to operate a snowplow in bad weather. Ringwood contended that Tundo demonstrated a pattern of excessive absenteeism particularly during inclement weather. The union contract allowed fifteen sick leave days per year. Tundo was absent from work twenty-six days in 2013, and fifty-eight days in 2014.

In 2014, Tundo received a written warning that he used sick and personal time in excess of the union contract. He was advised future violations would result in discipline, including "suspension and possible termination." He then failed to report for light duty and was docked. He received another written warning in 2014 about excessive absenteeism.

In January 2015, he received a written warning for not responding to a snow event after receiving advance notice. In

April 2015, he was suspended for four days when he inconsistently explained the reason for his absence. In May 2015, he was suspended for seven days for not reporting. He received other written warnings in August, September and December 2015, for his use of sick leave days. Tundo testified he did not receive these written warnings, while Scott Heck, Ringwood's Borough Manager, testified that he met with Tundo several times to discuss his attendance and personally handed the warning memos to Tundo. Tundo was advised he had to submit a doctor's note for any use of sick time.

Tundo called out sick on January 22 and 25, 2016, when there was a large snow storm. He did not provide a doctor's note as required. He received a fifteen-day suspension.

On February 15, 2016, a holiday, Tundo was not one of two employees who were on a "stand-by" list. However, because of a snow event, Heck testified all laborers were called in to work. Tundo testified he was not called, but a record shows that Tundo was called at 4:43 a.m., and declined to go into work.

On February 16, 2016, Tundo testified he left for work about 75 minutes early but his four-wheel drive vehicle slid into a curb near his house, and although there was no damage to his vehicle, he called out because of the icy road conditions.

Tundo was involuntarily terminated from employment on February 26, 2016. The grounds for termination included: "Insubordination," "Inability to Perform Duties," "Chronic Absenteeism," "Neglect of Duty," "Abuse of Sick Leave," "Conduct Unbecoming a Public Employee," and "Other Sufficient Cause."

Tundo applied for unemployment benefits. In April 2016, he was notified by the Deputy Director of the Division of Unemployment and Disability Insurance (Deputy) that he was eligible for unemployment benefits. Ringwood appealed the Deputy's decision to the Appeal Tribunal.

In June 2016, following a hearing, the Appeal Tribunal disqualified Tundo from unemployment benefits under N.J.S.A. 43:21-5(b), finding "simple misconduct connected with the work" based on his record of excessive absenteeism. The Appeal Tribunal recounted Tundo's absences in January and February 2016, finding the "submitted evidence reflects that there was a pattern of behavior on the claimant's part in calling out during inclement weather, which is when his job required him most." In June 2016, the Deputy found Tundo was liable to refund \$3942 in benefits received.

Both Ringwood and Tundo appealed the Appeal Tribunal's decision to the Board. On August 22, 2016, the Board disqualified Tundo from receiving unemployment benefits under N.J.S.A. 43:21-

5(b) because of severe misconduct connected with the work. The Board agreed with the Appeal Tribunal "except that the claimant has a two-year history of repeated absences after written warnings and failed to show up for work when required." The Board found Tundo's "pattern of refusal to comply with reasonable workplace rules is malicious and deliberate and constitutes severe misconduct connected with the work."

Tundo appeals, contending the Board's finding of severe misconduct was not supported by the record. He argues that the employer did not show proof that he declined to work on February 15, 2016. Furthermore, on February 16, 2016, he followed proper procedure by calling in because the roads were too slippery.

II

Our review of an agency's decision is limited. "If the Board's factual findings are supported 'by sufficient credible evidence, courts are obliged to accept them.'" Brady v. Bd. of Review, 152 N.J. 197, 210 (1997) (quoting Self v. Bd. of Review, 91 N.J. 453, 459 (1982)). We will not intervene unless the Board's decision is "arbitrary, capricious, or unreasonable." Ibid.

A person is disqualified from unemployment benefits if he or she "has been suspended or discharged for severe misconduct connected with the work[.]" N.J.S.A. 43:21-5(b). The statute provides examples of severe misconduct which includes "repeated

lateness or absences after a written warning by an employer . . . misuse of sick time [and] abuse of leave[.]" Ibid; see N.J.A.C. 12:17-10.1(b) (setting forth the length of the disqualification where a person is suspended or discharged for severe misconduct connected to the work).

Pursuant to regulation, severe misconduct is defined as "an act which (1) constitutes 'simple misconduct,' as that term is defined in this section; (2) is both deliberate and malicious; and (3) is not 'gross misconduct.'" N.J.A.C. 12:17-2.1. In Silver v. Bd. of Review, 430 N.J. Super. 44, 55 (App. Div. 2013), we construed severe misconduct based on repeated lateness or absences after a written warning "as requiring acts done intentionally, deliberately, and with malice." Further, we understood "'intentional' and 'malicious' as used in the regulation to include deliberate disregard of the employer's rules or policies or deliberate disregard of the standards of behavior that the employer has the right to expect of an employee." Id. at 56.

Given our standard of review, we have no basis to interfere with the Board's determination to disqualify Tundo from unemployment benefits for severe misconduct connected to his work based on his pattern of excessive absences. Tundo was given notice verbally and in writing and served increasing longer periods of suspension based on his chronic absences. The evidence supports

the Board's findings that he had a two-year pattern of absences, calling out during inclement weather, received written warnings, and failed to attend work. This record supported the Board's conclusion that Tundo's chronic absenteeism was "malicious and deliberate" because his services as a snow plow operator were needed in inclement weather.

This case is not similar to Parks v. Bd. of Review, 405 N.J. Super. 252 (App. Div. 2009), where we found all of the absences were due to family emergencies. The Board was entitled to infer from Tundo's repeated absences that he was deliberately indifferent to his employer's policies.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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